



Citation: *DS v Canada Employment Insurance Commission*, 2023 SST 406

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: D. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated December 27, 2022
(GE-22-2770)

Tribunal member: Melanie Petrunia

Decision date: April 10, 2023

File number: AD-23-117

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, D. S. (Claimant), was suspended from her job because she did not comply with her employer's COVID-19 vaccination policy. She applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the reason for the Claimant's suspension was misconduct. It decided that the Claimant was disentitled from receiving benefits. The Claimant requested reconsideration and the Commission maintained its decision.

[4] Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant was suspended from her job because of misconduct and she is disentitled from receiving EI benefits.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, she needs permission for her appeal to move forward.

[6] I have to decide whether there is some reviewable error of the General Division on which the appeal might succeed. I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Preliminary matters

– New evidence

[7] With her application for leave to appeal, the Claimant has included a new document that was not before the General Division.¹

[8] I will not consider this new evidence. It is well established that the Appeal Division cannot consider new evidence because it is not rehearing the case. The Appeal Division decides whether the General Division made certain errors, and if so, how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had before it was it made its decision.

[9] There are exceptions to this general rule, but none apply in this case.² So, I have not considered the Claimant's new evidence.

Issue

[10] Does the Claimant raise any reviewable error of the General Division upon which the appeal might succeed?

I am not giving the Claimant permission to appeal

[11] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?³

[12] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed in the *Department of Employment and Social Development Act* (DESD Act).⁴

¹ See AD1-8 which is a screenshot of a social media post allegedly posted by an executive from the Claimant's employer.

² Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal described in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paragraph 8.

³ This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.

⁴ DESD Act, s 58(2).

[13] An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) based its decision on an important factual error;⁵ or
- d) made an error in law.⁶

[14] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that there is a reasonable chance of success based on one or more of these grounds of appeal. A reasonable chance of success means that the Claimant could argue her case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.⁷

– **The General Division decision**

[15] The Claimant worked as a courier driver. Her employer introduced a mandatory vaccination policy that required employees to be vaccinated against COVID-19. The Claimant requested a human rights exemption, but it was denied by her employer.

[16] The Claimant was placed on an unpaid leave of absence (suspension). The General Division considered the reason for the Claimant's suspension. It found that the Claimant was suspended from her job because she did not comply with the employer's vaccination policy.⁸

⁵ The language of section 58(1)(c) actually says that the General Division will have erred if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it. The Federal Court has defined perverse as "willfully going contrary to the evidence" and defined capricious as "marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent" *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.

⁶ This paraphrases the grounds of appeal.

⁷ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁸ General Division decision at para 12.

[17] The General Division then had to decide whether this reason for the Claimant's suspension is considered misconduct under the law. It set out the relevant case law that applies to questions of misconduct and noted that the Commission had to prove that it was more likely than not that the Claimant was suspended because of misconduct.⁹

[18] The General Division found that the Commission had proven misconduct. It found that the Claimant was aware of the vaccination policy. It also found that she knew that she could be placed on an unpaid leave of absence if she wasn't vaccinated by the deadline given by the employer.

– **No arguable case that the General Division erred in law**

[19] The Claimant argues that the General Division made an error of law. She says that "the law" is referred to many times in the General Division decision but she doesn't know which law is being referred to. The Claimant argues that there is no law requiring anyone to take the vaccine against COVID-19.¹⁰

[20] The Claimant takes issue with the General Divisions determination that it is not within its jurisdiction to determine whether the employer's policy was fair or reasonable. She asks who jurisdiction it would be and says that vaccines were not part of her job requirement when she was hired.¹¹

[21] The Claimant also argues that she has not broken any laws and her constitutional and human rights have been violated. She says that she did not know without a doubt that she would be suspended and that her Record of Employment said dismissed which she has proven was not the case. She says this is fraud on the part of the employer.

[22] The General Division found that the reason for the Claimant's suspension was misconduct under the law. It referred to a number of decisions from the Federal Court and the Federal Court of Appeal that discuss misconduct under the *Employment*

⁹ General Division decision at paras 14 to 16.

¹⁰ AD1-3

¹¹ AD1-3

Insurance Act (EI Act). While the General Division did not explicitly state that the law it was considering is the EI Act, this is clear in its analysis.

[23] The Claimant disagreed with the Commission's decision to disentitle her from receiving EI benefits. It was this decision that she was appealing to the General Division. I find that there is no arguable case that the General Division erred in law when it determined that the Claimant's suspension is considered misconduct under the law.

[24] The General Division accurately summarized the law concerning misconduct.¹² It correctly stated that it does not have the authority to decide whether an employer's policies are fair or reasonable.¹³ It is well-established that a deliberate violation of the employer's policy is considered misconduct within the meaning of the EI Act.¹⁴

[25] As the General Division found, whether the employer's policy was fair or violated the Claimant's employment contract or human rights are matters for other forums. Where EI benefits are at issue, the only questions that matter are whether the Claimant breached her employer's policy and, if so, whether that breach was deliberate and foreseeably likely to result in dismissal.

[26] I find that the Claimant's arguments do not have a reasonable chance of success. A recent decision from the Federal Court confirmed that the test for misconduct is very narrow and that questions regarding fundamental rights and freedoms and the factual basis for imposing vaccine requirements are properly advanced in other forums.¹⁵

[27] The General Division found that the test for misconduct was made out in the Claimant's case. Its findings are supported by the evidence, and it correctly applied the law.

¹² General Division decision at paras 14 to 16.

¹³ General Division decision at paras 26 and 49.

¹⁴ *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

¹⁵ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[28] I find that there is no arguable case that the General Division made any errors of law. Aside from the Claimant's arguments, I have also considered the other grounds of appeal. There is no arguable case that the General Division based its decision on any factual errors. The Claimant has not pointed to any procedural unfairness or errors of jurisdiction, and I have not identified any such errors.

[29] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

Conclusion

[30] Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division